UNTIED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

UNITE HERE, LOCAL 2850,

Petitioner,

v.

SCOMAS OF SAUSALITO, LLC

Respondent.

CASE NO.: 20-CA-116766

RESPONDENT SCOMAS OF SAUSALITO, LLC'S MOTION FOR RECONSIDERATION

Pursuant to Section 102.48(d)(1) of the Rules and Regulations of the National Labor Relations Board ("Board") Respondent SCOMAS of Sausalito, LLC ("SCOMAS") respectfully requests that the Board reconsider its August 21, 2015, Decision and Order, which affirmed the ALJ's ruling, findings and conclusions, and adopted the recommended Order as modified.

SCOMAS respectfully requests that the Board reconsider its Decision on the following grounds: 1). The Board failed to consider Respondent's Exception No. 6 [1] as evidenced by Member Johnson's statement that had the issue been raised in exceptions, he would require that unions present evidence of reacquired majority status within a reasonable amount of time. This apparent contradiction or omission to consider a relevant exception is a material error and presents extraordinary circumstances warranting reconsideration of the Board's August 1 Decision. Rs. & Regs. of NLRB § 102.48(d)(1) ("A party to a proceeding before the Board may, because of extraordinary circumstances move for reconsideration . . . after the Board's decision and order."). 2).

[1] "Charged party excepts to the ALJ's ruling that the Union had no duty to inform SCOMA that it had obtained revocation signatures from decertification signers sufficient to defeat majority support before, or even after, SCOMA withdrew recognition. (Decision 7:33-35)." Respondent Exception No. 6.

In light of the failure to consider Exception No. 6, the Board should also consider the appropriateness of an alternative remedy (i.e., an election).

1. **The Board Failed to Consider Exception No. 6 as Evidenced by Member Johnson's Dissent in the August 21 Decision.**

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board announced a new standard for withdrawing recognition from an incumbent union: "We therefore hold that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees. . ." *Levitz,* 333 NLRB at 717.

The ALJ in her decision of February 23, 2015, relied on this case to find that SCOMAS unlawfully withdrew recognition of the Union despite the fact that they had objective evidence of Union loss of majority support, and further found that the Union had no affirmative duty to notify SCOMAS that they had reacquired majority support. On April 4, 2015, Respondent specifically excepted to this ruling at Exception No. 6:

"Exception 6: Charged party excepts to the ALJ's ruling that the Union had no duty to inform SCOMA that it had obtained revocation signatures from decertification signers sufficient to defeat majority support before, or even after, SCOMA withdrew recognition. (Decision 7:33-35)."

Despite this specific exception, in the instant Decision, Member Johnson at footnote 2 stated, "*Were the issue raised in exceptions*, however, he would modify the *Levitz* standard by requiring that unions present evidence of reacquired majority support within a reasonable amount of time. . ." (Emphasis added). This exact issue WAS raised in the exceptions.

Member Johnson also pointed out that former Chairman Battista proposed this exact requirement in *Parkwood Developmental Center*, 347 NLRB 974 (2006). In Member Johnson's view, "Imposing an affirmative disclosure obligation would be more consistent with the Act's fundamental policies of promoting stability in bargaining relationships and protecting employee

free choice . . . In this case, for instance, the union's failure to give notice of its restored majority status misled the Respondent into a disruptive unlawful withdrawal with the collateral effect of precluding employees from filing a decertification election procedure with the board."

This is the exact argument Respondent raised in their brief and Exception No. 6. Respondent specifically argued that "under the facts of this case, and to further the interests of the employees, public policy requires the union to disclose to Scoma's information showing they had majority support at the time of withdrawal . . . The Union's failure to inform Scoma's that some of the employees might still support the Union led to an unstable and uncertain situation for at least the last 24 months, specifically because an election could have been held to determine the true desire of the employees and avoided the waste of resources and time. This goes beyond mere Union gamesmanship, as it affects employees' Section 7 rights and delays what should have been an orderly process for determining a question concerning representation."

From Member Johnson's dissent, it appears that neither he, nor the other two members, considered Exception No. 6. Had it been considered, it is likely that Member Johnson would have persuaded the other two members to follow his and former Chairman Battista's proposed modification of the *Levitz* standard by requiring a Union to show evidence of re-acquirement of majority support within a reasonable amount of time. [2]

2. **The *Levitz* Standard Should Be Modified to Minimize Gamesmanship and Disruption of the Bargaining Relationship.**

Because the Board did not consider Exception No. 6, it also did not consider an alternative remedy suggested by Respondent, i.e., reinstating the October 29, 2013 decertification petition (which would not have been withdrawn had the union disclosed requirement of majority status), and ordering a new election.

At the time SCOMAS withdrew recognition on October 31, 2013, the October 29, 2013 decertification petition filed by the employees contained more than half of SCOMAS' employees' signatures. This Decertification Petition, which contained sufficient signatures for

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[2] It is noted in this case, that the Union reacquired majority support a mere two days prior to SCOMAS withdrawing recognition.

an election, was subsequently withdrawn after Scoma's withdrew recognition and before the Union filed the instant Unfair Labor Practice Charge.

In his dissent, Member Johnson stated that the Union's failure to give SCOMAS notice of its restored majority status misled SCOMAS and precluded the employees from filing their decertification petition. In fact, it did not preclude the employees from filing; rather, it caused the employees to file a request to withdraw the previously filed petition; this request was approved by the Board on November 6, 2013.

Had the Union been required to disclose its restored majority status, recognition would not have been withdrawn and the will of the employees would have been heard by having an election.

While *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001) states an employer withdraws recognition at its own peril, *Levitz* did not envision or even touch upon a situation in which the union possessed but intentionally withheld from the employer evidence that would provide doubt about the will of the employees. Rather, *Levitz* makes clear that its "essence and purpose" is protecting the employees' Section 7 rights to freely choose their representatives. This right is protected by requiring the Union to "show its cards" and request re-recognition by the employer when facts such as in the instant case exist.

Levitz also did not touch upon the situation where the withholding of this information resulted in employees requesting withdrawal of a previously filed Decertification Petition, and the Board acquiescing in that withdrawal.

Importantly, the withdrawal of recognition at Scoma's did not involve any other unfair labor practice charges. However, "Even when the withdrawal of recognition is accompanied by independent unfair labor practices, the courts have several times concluded that the Board had not demonstrated that a fair rerun election was impossible. *Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493 (5th Cir. 1972); *Automated Business Systems v. NLRB*, 497 F.2d 262 (6th Cir. 1974). It would indeed be anomalous if the employees of an employer who withdrew recognition from an incumbent Union in good faith but without sufficient objective evidence automatically lost their free choice rights in the interest of deterrence, while the employees of an employer who committed deliberate unfair labor practices would have the opportunity to express their wishes in

a rerun election unless the violations were so coercive that the Board could fairly determine that a free election was impossible." *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 46, n. 21, 203 U.S. App. D.C.1 (D.C. Cir. 1980).

Had the Union actually shared the revocation signatures with Respondent, Respondent would not have withdrawn recognition, and an election would have occurred in the normal course of events. That is exactly what should happen in this case.

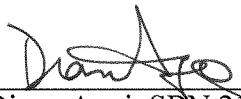
IV.

CONCLUSION

Based on the foregoing, Respondent requests that the Board grant its motion for reconsideration, and evaluate the facts and public policy as it relates specifically to Exception No. 6, the arguments, and suggested alternative remedies.

Date: August 31, 2015

Respectfully Submitted,

By 

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PROOF OF SERVICE

I am employed in the County of Sonoma, State of California. I am over the age of 18 years and not a party to the within action. My business address is 404 Mendocino Avenue, Second Floor, Santa Rosa, CA 95401. On August 31, 2015, I served the attached **RESPONDENT SCOMAS OF SAUSALITO, LLC'S MOTION FOR RECONSIDERATION** on the parties to this action by serving:

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/X/ **BY EMAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed above. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission

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/X /**OVERNIGHT MAIL:** I caused the above-described document(s) to be served by Federal Express or via overnight delivery to the offices of the addressee

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August 31, 2015

/s/ Sheila Force

Sheila Force